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NO. 84-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LAWRENCE L. GHIDONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BANK OF NOVA SCOTIA IN SUPPORT OF AFFIRMANCE

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August 31, 1984

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INTRODUCTION

The Bank of Nova Scotia ("the Bank") respectfully submits this brief as *amicus curiae* in connection with the Court's consideration of the petition of Lawrence L. Ghidoni for a writ of certiorari.[1] The Bank submits that the writ of certiorari should be denied.

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1 Both petitioner and respondent have consented to the appearance of the Bank as an *amicus*, and written consents are on file with the Clerk. The Bank previously appeared as an *amicus* in this matter, supporting the United States before the United States Court of Appeals for the Eleventh Circuit.

Facts

The Bank's Miami agency was served by the United States with a trial subpoena issued by the U.S. District Court for the Northern District of Florida, which called for the production of certain records "maintained by the Bank of Nova Scotia at any of its main or branch offices in the Cayman Islands . . ." relating to several named persons and entities, including petitioner. However, production of such documents from the Cayman Islands in response to the subpoena, absent compliance with the Cayman Confidential Relationships (Preservation) Law, would expose the Bank and its officers to criminal penalties, including imprisonment and fines. Such production would be authorized under the Cayman statute if the "consent, express or implied, of the relevant principal" is obtained. Confidential Relationships (Preservation) Law, *as amended*, at § 3(2)(b)(i).

To avoid requiring the Bank to violate the Cayman criminal law in the course of complying with the subpoena, the United States made a motion before the district court for an order requiring the petitioner to execute an appropriate "direction" to the Bank authorizing disclosure. That motion was granted. However, the petitioner refused to execute the document, and was held in contempt by the district court. The defendant appealed the contempt order to the Eleventh Circuit, which affirmed the district court order on May 2, 1984. After his suggestion for rehearing en banc was denied on June 8, 1984, petitioner filed a petition for a writ of certiorari.

The Bank's Interest

The Bank's interest in this matter is two-fold. First, the proceedings below were precipitated by the service of a trial subpoena on the Bank's Miami agency, calling for the production of documents located in the Cayman Islands. Consequently, the disposition of this matter will have an immediate and significant impact on the Bank with respect to its response to the subpoena and the collateral consequences that may result in the Cayman Islands.

Second, the Bank, a large multinational financial institution with more than 1,200 offices in over 46 countries around the globe, is a frequent recipient of grand jury subpoenas, trial subpoenas, IRS summonses, and similar process in the United States, many of which call for the production in one jurisdiction of documents located in another.[2] Many of the world's significant banking and commercial centers, including Switzerland, the Bahamas, the Cayman Islands, Singapore and others, have financial privacy statutes, backed by criminal sanctions. Accordingly, the Bank has a great interest in identifying every means by which it can promptly comply with U.S. subpoenas without violation of applicable foreign criminal laws. This case involves one approach to resolving the dangerous jurisdictional dilemma presented when the mandates of different nations conflict.

ARGUMENT

THE DECISIONS OF THE DISTRICT COURT AND THE ELEVENTH CIRCUIT ARE IN HARMONY WITH THE DECISIONS OF THIS AND OTHER COURTS

In ordering petitioner to execute the direction authorizing the Bank to disclose the subpoenaed documents, both the Eleventh Circuit and the district court clearly recognized the conflicting legal obligations the Bank faced. More importantly, both courts recognized the inequity of placing on the Bank, a disinterested and neutral non-party, the burden of resolving those conflicting obligations. Instead, the burden was placed on the defendant-petitioner, where it reasonably belongs.

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2 The Bank has today filed a petition for a writ of certiorari in a case which arose from the service of a grand jury subpoena in Miami for documents from the Bahamas, the Cayman Islands and Antigua. *In re Grand Jury Proceedings. Bank of Nova Scotia v. United States*, Nos. 83-5708, 84-5198 (11th Cir. Aug. 14, 1984), *cert. pet. filed*, No. 84-____ (U.S. Aug. 31, 1984).

After all, bank records in the United States are not protected from disclosure by any Constitutional or statutory privilege, and this Court has declared that a bank customer can have no reasonable expectation of privacy in bank records. *United States v. Miller*, 425 U.S. 435 (1976); *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). The Court has explained that bank records are not a defendant's "private papers" but, rather are the business records of the bank, which contain only information voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business. *See United States v. Miller, supra*, 425 U.S. at 440-442. It is clear that if the records at issue in the present case were maintained in an office of the Bank located within the United States, they would be subject to production. Furthermore, as the district court explained, "It is very important to keep in mind . . . that foreign bank secrecy laws provide no privacy rights for United States citizens that are not otherwise present under the Constitution and laws of the United States." *United States v. Ghidoni*, TCR 83-07016, slip op. at 4 (N.D. Fla. Dec. 30, 1983), *citing United States v. Payner*, 447 U.S. 727 (1980).

The procedure approved by the Eleventh Circuit and the district court in this case simply provides access to documents of the type that are routinely available to federal prosecutors. The same procedure has regularly been applied by other courts facing the same dilemma.[3] Further, the approach is quick, efficient, inexpensive, and places little burden on the courts or the parties.[4]

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3 *See U.S. v. Davis*, 83 Cr. 551 (WCC) (S.D.N.Y. June 14, 1984); *U.S. v. Quigg*, 48 A.F.T.R.2d 5953 (D.Vt. January 5, 1981); *U.S. v. Dial*, No. 83 Cr. 271 (N.D. Ill. July 28, 1983); *In re Grand Jury Investigation 82-1691* (N.D. Ill. December 15, 1983); *see also SEC v. Mussella*, 83 Civ. 8342 (CSH) (S.D.N.Y. Sept. 7, 1983) (SEC enforcement action); *Traboulsi v. Shearson Loeb Rhodes, Inc.*, 80 Civ. 7088 (WK) (S.D.N.Y. Oct. 1, 1981).

4 Recently, a justice of the Grand Court of the Cayman Islands, following a hearing in chambers, issued a judgment that a consent directive of the type adopted by the district court in this case "does not amount to consent as contemplated by section 3(2)(b)(i)" because it is signed under compulsion. *In the Matter of an Application by ABC*

(footnote continued)

While petitioner argues that a writ of certiorari should be granted because the case raises an important and novel question concerning the privilege against self-incrimination, this Court has already provided the lower courts with abundant guidance as to the proper application of the privilege in cases raising the issues presented here. *See, e.g., United States v. Doe*, ____ U.S. ____, 52 U.S.L.W. 4296 (February 28, 1984); *United States v. Miller, supra*; *California Bankers Ass'n v. Shultz, supra*; *Fisher v. United States*, 425 U.S. 391 (1976).

It is clear from those cases that the district court's order raises no meaningful Constitutional issue. The Court has noted that "it is . . . clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher v. United States, supra*, 425 U.S. at 408 (emphasis in original). The Court has explained that "the distinction which has emerged . . . is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber v. California*, 384 U.S. 757, 764 (1966); *Fisher v. United States, supra*.

The execution of the direction required by the Eleventh Circuit's decision is not testimonial in nature, and therefore cannot fall within the proscription of the self-incrimination privilege. By signing the direction petitioner is communicating nothing about the bank records themselves, and remains free to deny their existence and authenticity, as well as his control over them. The direction is intended only to lift the bar of Cayman criminal law which now prevents the Bank from producing documents that are the Bank's, not petitioner's. Whether, as a matter of Cayman law, the direction is effective to lift that bar is not properly an issue in this proceeding.

Ltd. Under the Confidential Relationships (Preservation) (Amendment) Law 1979, Cause No. 269 of 1984 (Grand Court of the Cayman Islands July 24, 1984). The Bank was not involved in any manner in that application.

CONCLUSION

Because the Bank is a major financial intermediary, it regularly receives process calling for the cross-border production of documents. In such circumstances, the Bank, as a neutral non-party, has no interest whatsoever in the underlying dispute. The Bank's only interest is to obey the applicable laws of each and every jurisdiction in which it is present. The Bank is committed to taking every reasonable step to produce subpoenaed documents, short of the commission of a crime. The procedure adopted by the district court in this case, and affirmed by the Eleventh Circuit, achieves a fair and equitable result, in which the requirements of judicial administration in the United States may be satisfied promptly and efficiently, without coercing a neutral intermediary to break the criminal law of friendly foreign sovereigns.

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed Brief *Amicus Curiae* of the Bank of Nova Scotia have been served this ____ day of August, 1984, by mail, postage prepaid, upon the following counsel:

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